No. 155

SEP 13 1951

IN THE

District Court of Appeals

SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

ON APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

ALBION R. ALLEN, et al., *Plaintiffs and Appellants,*

vs.

CITY OF LONG BEACH, et al., *Defendants and Appellees.*

LEE R. ADAMS, et al., *Plaintiffs and Appellants,*

vs.

CITY OF LONG BEACH, et al., *Defendants and Appellees.*

MOTION FOR LEAVE TO FILE ANNEXED BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes the American Federation of Labor, through counsel, and respectfully moves this Court, pursuant to its

Rule 27, Paragraph 9, for leave to file the accompanying brief as Amicus Curiae. The consent of the attorney for the Appellee was requested but was refused.

The following ground supports this Motion:

Affiliated with the American Federation of Labor are approximately fifteen (15) national and international labor organizations whose members are employed by governmental bodies or agencies. In addition to the Federal government, these agencies include many states, counties and municipalities. Many thousands of their employees are members of American Federation of Labor unions. Almost universally, these employees own valuable pension rights accumulated through years of service pursuant to laws enacted by the respective employer governments. All will be affected by this Court's decision in the instant case.

Therefore, the American Federation of Labor as the supreme parent body charged with safeguarding its members' employment rights, submits the supporting brief. The brief contains authority not presented by any of the parties.

Respectfully submitted,

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AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

On November 6, 1950, this Court denied Certiorari in *Anglin v. Bender*, 340 U. S. 878, 71 S. Ct. 125. That case is virtually on all fours with the one at bar. It involved the constitutionality of a Georgia statute which purported to reduce the retirement pension payable to the appellee who had performed substantial services as a fireman prior to the adoption of the amendment, but who did not retire until

some seven years later. The Georgia Supreme Court *Bender v. Anglin*, 207 Ga. 108, 60 S. E. 2d 756, held that the amendment was inaffective insofar as it purported to reduce the retirement pension payable to the employees because it contravened the state and federal constitutional provisions aimed at prohibiting the impairment of contractual obligations.

The fireman Bender was employed in 1915 and retired in 1942. The original statute as adopted in 1924 provided for the payment of a retirement pension of $100 per month to firemen who served the requisite period of time. Under the terms of the 1935 amendment, the retirement pension was reduced to $75 per month. There, as in the case at bar, the appellee had submitted to salary deductions which were paid into a fund established for the payment of the pension. In holding that the employee was entitled to recover the difference between the $100 per month as promised by the original statute and the $75 that he had actually been paid, the Georgia Supreme Court at page 760 said:

> "* * * *No amount of judicial theorizing can escape the plain fact that the existence of a law which promises benefits upon retirement or injury constitutes an inducement to accept the position of fireman, thereby incurring the risks and hazards which the very nature of the work imposes.* Nor do we think it can correctly be said that the provision for taxing the salary prevented the portion of the salary covered by the tax from *becoming the property of the fireman. When it was taken and placed in the fund from which the benefits were to be paid, it constituted a contribution by the fireman of a part of the salary which he had earned by his services.*" (Italics ours.)

The court then referred to certain state constitutional provisions which, like those contained in the California

Constitution, prohibit the use of public funds for gratuitous purposes and at the same page continued:

> *"In the present case, the fireman was not eligible, under the law, to retire when the 1395 Amendment was enacted, but he had been a party to the contract since its inception with the approval of the original law of 1924, and by the contribution of a portion of his salary together with his services he had paid a consideration which gave him a vested right that was protected by the Constitutions. Consequently the attempt by the 1935 Amendment to impair that contract was utterly void."* (Italics ours.)

A similar construction has been placed upon the very statutes under consideration in the case at bar by the California Supreme Court in *Kern v. City of Long Beach*, 29 Cal. 2d 848, 179 P. 2d 799. At pages 802, 803, the Court said:

> "• • • Since a pension right is 'an integral portion of contemplated compensation,' • • • it cannot be destroyed once it has vested, without impairing a contractual obligation. *Thus the courts of this state • • • have uniformly held that pension laws such as the Long Beach charter provision establish contractual rights.*"
>
> "• • • Accordingly, *we conclude that petitioner has a vested pension right and that respondent city, by completely repealing all pension provisions, has attempted to impair its contractual obligations. This it may not constitutionally do, and therefore the repeal is ineffective as to petitioner.*" (Italics ours.)

In fact, the situation presented in the case at bar is somewhat unique in that the decision of the District Court of Appeal herein is obviously at variance with the ultimate decision of the California Supreme Court (the highest court in that state) in the *Kern* case, wherein it was determined that the repealing statute was ineffective as to the petitioner

Kern, who occupied exactly the same relationship toward the City as do the appellants herein. The fact that the California Supreme Court denied the petition for hearing in the case at bar does not necessarily mean that that court approved of the "propositions of law laid down in such opinion," because the granting of such a petition is purely discretionary. (*People v. Davis*, 147 Cal. 346, 81 Pac. 718; *Western Lithograph Co. v. State Board of Equalization*, 11 Cal. 2d 156, 78 P. 2d 73.) In the last cited case the court observed that the denial of such a petition after a decision by the California District Court of Appeal "is not an affirmative approval by this court of the propositions of law laid down in such opinion."

The true distinction between the contractual obligation which is created by the performance of services in reliance upon a statutory enactment that provides for the payment of stipulated retirement benefits upon the completion of a specific number of years of service, and the non-contractual or gratuitous payments which are ofttimes provided by statute in recognition of past services, was recognized by this court in the case of *Dismuke v. United States*, 297 U. S. 167, 56 S. Ct. Rep. 400, 80 L. Ed. 561. This case arose upon a petition for certiorari to the Circuit Court of Appeals, Fifth Circuit, and the principal question presented was whether or not the Federal District Court had original jurisdiction. The petitioner was a retired government employee, seeking to enforce the payment of certain retirement benefits as provided in the Civil Service Retirement Act. The government argued that the Federal District Court was without jurisdiction because the claim was for a pension, whereas the petitioner contended that his claim came within the terms of the Tucker Act which conferred jurisdiction in cases where the claim was based upon "any contract, express or implied, with the government of the

United States." In holding that the Federal District Court did have jurisdiction to entertain the case and hence that the United States Supreme Court had jurisdiction to entertain the appeal, this Court, speaking through Justice Stone, at page 564 said:

> " * * * The declaration that the annuities are payable from the retirement fund, which, by § 8 of the Act of May 22, 1929, 41 Stat. at L. 614, 618, chap. 195, U. S. C. A. title 5, § 719, is 'appropriated for the payment of annuities,' amounts to no more than a direction that they shall be charged on the books of the Treasury to the appropriation made for their payment. It does not impair or restrict the obligation to pay.
>
> "The Tucker Act declares that it shall not be construed as giving jurisdiction of 'claims for pensions' or 'of cases brought to recover fees, salary or compensation for services of officers of the United States.' The government argues that the present suit must be either the one or the other. It does not press the contention that the annuities are 'salary or compensation,' which we think without merit, see Retirement Bd. v. McGovern, 316 Pa. 161, 174 A. 400, but it insists that the suit is brought to recover a pension. The proviso withholding jurisdiction of suits on claims for pensions was a part of the original Tucker Act, which became law March 3, 1887, long before the enactment of the Retirement Act of May 22, 1920, and at a time when the term 'pensions' commonly referred to the gratuities paid by the government in recognition of past services in the Army or Navy. *The annuities payable under the Retirement Act are not gratuities in that sense. The annuitant contributes to them by deductions from his salary or by actual payments into the fund, as in the present case, and the scheme of the Act is to provide for payment of annuities, in part at least from contributions by employees, in recognition both of their past services and of services to be performed.*
>
> "The Act itself, in contradistinction to the nu-

merous pension acts, see U. S. C. A. title 38, does not refer to the annuities as pensions, and expressly excludes from the service to be counted, in determining the class to which the annuitant is to be assigned, the period for which the employee 'elects to receive a pension under any law . . . ' § 3, Act of May 22, 1920, 41 Stat. at L. 615, chap. 195, U. S. C. A. title 5, § 707. *We conclude that annuities payable under the Retirement Act are not pensions within the meaning of the Tucker Act and that suits against the government to recover them are within the jurisdiction of district courts,* if not precluded, as the court below held they are, by the administrative provisions of the Retirement Act." (Italics ours.)

Essentially the same distinction was recognized by the California Supreme Court in *Gibson v. City of San Diego,* 25 Cal. 2d 930, 156 P. 2d 737, at page 937, viz.:

"As observed by this court in O'Dea v. Cook (1917), 176 Cal. 659, 661 [169 P. 366], 'A pension such as this law contemplates is not a gratuity or a gift. . . . [W]here, as here, services are rendered under such a pension statute, the pension provisions become a part of the contemplated compensation for those services and so in a sense a part of the contract of employment itself.' And in Klench v. Pension Fund Commissioners (1926), supra, 79 Cal. App. 171, 185, the court said: '*A pension is a gratuity only where it is granted for services previously rendered which, at the time they were rendered, gave rise to no legal obligations.* [Citations] . . . *And herein lies an important distinction between pension laws which, like those we now have before us, provide for pensions for services performed for the government or disabilities occurring while rendering such services after the law has been passed, and a pension system designed to care for or reward soldiers for disabilities suffered or services rendered in the past. . . .* ' " (Italics ours.)

The fact that the term "pension" is used to describe the benefits payable does not of course mitigate against the true nature of the payment. The term has been variously used to define any periodical payment that is made by the government to retired officers or employees and to the widows and children of men killed in government service. (See New Twentieth Century Dictionary.)

Speaking of a similarly worded statute, the Pennsylvania Court in *Kelly v. Loveland*, 141 Pa. Super. 455, 15 Atl. 411, at page 415 said:

> " • • • This ordinance, in spite of the use of the misleading term 'pension,' throughout its provisions in legal contemplation creates what might more accurately be denominated a retirement fund. The 'pension' payable to eligible employees is not a mere gratuity or bounty, but is earned compensation arising out of a contract right."

Similarly in *Bausewine v. City of Philadelphia Police Pension Fund Assn.*, 237 Pa. 267, 10 Atl. 2d 446, the court at page 447 said:

> " • • • Regardless of the fact that the Association designated its fund as a 'pension' fund, and the payments upon retirement to those entitled thereto 'pensions,' there can be no doubt that the fund is a retirement fund and the payments retirement pay; as such they represent in part adjusted compensation."

To the same effect see:

Quam v. City of Fargo (1950 N. D.) 43 N. W. 2d 292, 296;

Mattson v. Flynn, 216 Minn. 354, 13 N. W. 2d 11, 15;

Cobbs v. Home Ins. Co., 18 Ala. App. 206, 91 So. 627, 629.

In the last cited case the court, in referring to a statute which used the term "pension" said: "The compensation thus paid, by whatever name called, is not a gratuity, but

a part of the stipulated consideration, for which they contracted and served."

The foregoing decisions would seem to apply with equal force to the case at bar. Here the appellants were induced to enter into and continue their employment with the appellee as a result of the specific benefits, including pension rights, offered by the charter. They refrained from accepting other higher paying employment opportunities because of their rights to earn and receive the specific retirement benefits. Throughout the major portion of their service, various deductions were made from their salaries upon the understanding that the money so withheld would be used to pay the specific benefits promised. These controlling facts clearly distinguish the instant case from the authorities dealing with gratuities or bounties, such as were before this court in *Frisbie v. United States*, 157 U. S. 160, 39 L. Ed. 657.

A substantial federal question has been posed by the case at bar. The rights of thousands of governmental employees depend upon this Court's decision herein. Moreover, the power of governmental bodies to attract and retain efficient, experienced personnel by protected retirement benefits will be directly affected by the outcome in the instant case.

For these reasons, the American Federation of Labor respectfully requests this Court to exercise its power to entertain the instant appeal.

Respectfully submitted,

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